Supreme Court, U.S.
FILED
SEP 29 1994
OFFICE OF THE CLERK

No. 94-116

In The

Supreme Court of the United States

October Term, 1994

SCHOOL CITY OF MISHAWAKA,

Petitioner,

v.

FAMILY & CHILDREN'S CENTER, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

JAMES M. LEWIS
(Counsel of Record)
DOUGLAS D. SMALL
BARNES & THORNBURG
600 1st Source Bank Center
100 North Michigan
South Bend, Indiana 46601
(219) 233-1171

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Indiana special education complaint procedure set forth at 511 IAC 7-15-4 and its predecessor 511 IAC 7-1-7 were promulgated pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., or pursuant to the Education Department General Administrative Regulations ("EDGAR"), 34 CFR 76.780-83.

RULE 29.1 STATEMENT

Respondent, Family and Children's Center, Inc., is a nonprofit corporation organized under the laws of the State of Indiana with its principal place of business in Mishawaka, Indiana. It has no parent company or non-wholly-owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.1 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Administrative Proceedings 5

B. Judicial Proceedings 7

ARGUMENT 10

A. Indiana's 511 IAC 7-1-7 and 7-15-4 are Regulations Promulgated Pursuant to the IDEA, not EDGAR 10

1. 511 IAC 7-1-7 was adopted before EDGAR was ever proposed 10

2. 511 IAC 7-15-4 is the complaint mechanism called for under the IDEA 11

B. The Seventh Circuit's Decision Turned on Indiana Law and Does Not Conflict With Any Other Holding of Any Court 16

C. The Seventh Circuit's Decision Does Not Conflict With Congressional Intent 18

D. The USDOE Memorandum Did Not Address The Seventh Circuit's Decision 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Hoeft v. Tuscon Unified School Dist., 967 F.2d 1298 (9th Cir. 1992) 15

Honig v. Doe, 484 U.S. 305 (1988) 7

Schoolcraft v. Sullivan, 971 F.2d 81 (8th Cir. 1992), *cert. denied*, 114 S.Ct. 902 (1994) 6

FEDERAL STATUTUES AND REGULATIONS

Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq 2, 7, 9

20 U.S.C. § 1415 ..... 2, 7, 9, 12, 15, 18

34 CFR 76.780-83 ..... 2, 12

34 CFR 300.660-62 ..... 2, 11, 12, 18, 19

45 CFR 100b 11

INDIANA STATUTES AND REGULATIONS

Indiana Code § 4-22-2-21 10

511 IAC 7-1-7 ..... 2, 9, 10, 11, 16

511 IAC 7-15 ..... 2, 12

511 IAC 7-15-4 ..... *passim*

511 IAC 7-15-5 ..... 2, 7, 12

Ariz. Admin. Code § R7-2-804 ..... 14, 15

No. 94-116

In The

Supreme Court of the United States

October Term, 1994

SCHOOL CITY OF MISHAWAKA,

Petitioner,

v.

FAMILY & CHILDREN'S CENTER, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 13 F.3d 1052. The opinion of the district court (*Id.* at 17a-35a) is not reported.

JURISDICTION

The court of appeals entered judgment on January 5, 1994 (Pet. App. 1a) and denied the Petition for Rehearing with Suggestion for Rehearing In Banc by Amended Order of March 17, 1994 (*Id.* at 60a).

STATUTES AND REGULATIONS INVOLVED

Three sets of legislative authority are at issue in this case: Indiana regulations, federal regulations, and federal statutes.

The Indiana regulations at issue comprise Rule 15 of Article 7 of Title 511 of the Indiana Administrative Code (511 IAC 7-15), which is entitled "Due Process Procedures." Within Rule 15, two regulations are particularly relevant: 511 IAC 7-15-4 and 7-15-5 (Pet. App. 73-80a). Also involved is a predecessor regulation, 511 IAC 7-1-7 (Res. App. 1-2).

The principal federal statute involved is the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., particularly 20 U.S.C. § 1415 (Pet. App. 61-66a).

The principal federal regulations at issue are the Education Department General Administrative Regulations ("EDGAR"), 34 CFR 76.780-83 (Pet. App. 70-72a), and 34 CFR 300.660-62 (Pet. App. 68-69).

STATEMENT OF THE CASE

This case concerns the obligation of the defendant, School City of Mishawaka ("School City"), to educate certain disabled children (the "Children") placed under the care, custody and control of the plaintiff, Family & Children's Center, Inc. ("FCC").

The facts underlying the dispute between the parties are aptly summarized by the Seventh Circuit in section I

of its opinion (Pet. App. 1-4). Respondent adopts the Seventh Circuit's statement of those facts as its own.[1]

---

[1] Petitioner's recitation of facts is incorrect in several respects. These are not relevant to the Court's decision whether to grant a Writ of Certiorari and thus will not be emphasized here by Respondent. Nevertheless, to avoid any claim of waiver, Respondent here sets forth in summary fashion misstatements of fact in the petition. Contrary to Petitioner's assertions:

1) FCC has legal custody of the Children. The Children have been placed with FCC as a result of court order or as a result of action by state or local child welfare departments.

2) It is not true that "many of the children are sexual offenders." Nor is it true that any of the children are "incarcerated."

3) Apart from its campus and offices in Mishawaka, FCC owns and operates three group homes: one in Mishawaka and two in South Bend. The group home environment is part of the overall treatment for many of FCC's Handicapped Children. There are frequent transfers of Handicapped Children between the group homes and the campus of FCC.

4) In 1979 FCC took action in response to the large number of Children School City suspended and expelled from its schools because of behaviors related to their disabilities. When School City expressed its unwillingness to deal with the Children in any other way, FCC began its own school and started educating the Children at its expense.

5) In 1982, FCC approached School City about the latter fulfilling its obligation to educate the Children. School City would only agree to provide FCC with a portion of transfer tuition monies received from the Children's home counties.

6) In 1982, School City entered into an agreement with FCC under which School City agreed to reimburse FCC 95% of the transfer tuition received as to FCC's Children and FCC agreed to provide the educational program for the Children.

7) Over the next eight years, there was an increase in the degree of emotional impairment and in the number of Children placed with FCC. Consequently, increased demands were placed upon FCC to meet the educational needs of the Children.

The issue before this Court turns not upon those facts, but upon the procedural history of the case and the

---

These circumstances, combined with the fact that School City was statutorily responsible for educating the Children, led FCC to request that School City again educate the children.

8) In February, 1990, School City announced at a meeting with FCC representatives that it was not responsible for and would not educate the Children at all. After much negotiation, School City finally acknowledged in July 1990 that it was legally responsible to educate the Children.

9) In August, 1990, FCC and School City entered into an agreement under which School City would assume full responsibility for the year-round education of FCC's Children beginning with the 1991 summer school session, and FCC agreed to construct or renovate a facility at its main campus for use by School City in educating the Children, which facility would be leased from FCC by School City.

10) In 1991, School City employed a new superintendent, who announced that School City would not honor its agreement with FCC. School City refused to pay rent to FCC for the use of its facilities to educate the Children; and refused to educate those Children who on a periodic and temporary basis are treated at FCC's two group homes in South Bend. School City then threatened that it would not proceed with educating any of the Children housed at FCC's main campus unless certain conditions were met. FCC objected to School City's use of the Children as "pawns" during the last-minute, forced negotiations. It was not until late August, 1991, that School City finally stated that it would provide educational services to the Children.

11) Since the 1991-92 school year, School City has only agreed to provide teachers and administrators, and only for those of the children who sleep at FCC's main campus. School City has refused to provide classrooms or facilities to educate FCC's Children and has refused to educate the children who are treated periodically at FCC's two South Bend group homes in South Bend. The refusal of School City to educate the Children periodically and temporarily treated at FCC's two South Bend group homes has resulted in great harm to the children.

history of the Indiana regulations under which the case proceeded.

A. Administrative Proceedings

On September 17, 1991, FCC filed a petition with the Indiana State Board of Education, requesting an order directing School City to (1) provide facilities, teachers, and staff for the education of the Children, (2) educate those of the children who are housed from time to time at FCC's group homes, (3) pay FCC for the fair and reasonable value of the use of FCC's facilities in educating the Children, (4) reimburse FCC for its expenses in educating the Children, and (5) provide year-round education for those children so in need.

The Indiana Department of Education ("IDOE") decided to address FCC's petition in a two-part manner. First, the IDOE referred the matter to its Division of Special Education (the "Division") for an investigation into whether School City had violated Indiana education regulations. On December 9, 1991, the Division entered findings of fact, conclusions of law, and orders (Pet. App. 36-50a). On December 22, 1991, FCC filed a Request for Reconsideration and, on January 14, 1992, the Division denied FCC's Request (*Id.* at 51-54a). FCC appealed the Division's findings to the United States Department of Education. On July 22, 1992, the United States Department of Education declined to hear FCC's appeal (*Id.* at 55a-56a).

Second, the IDOE, by its own action and over the objection of FCC, determined that the "Facilities Issue" – whether School City is obligated to provide classrooms

and related facilities in educating the Children - should be resolved as a transfer tuition matter and not as a special education matter. Because the Facilities Issue was viewed by the IDOE as a matter involving Indiana's transfer tuition statute, the hearing officer dismissed that portion of FCC's petition, concluding that transfer tuition could only be received by a school corporation and FCC was not a school corporation (*Id.* at 57-59a). The hearing officer concluded that "FCC and School City have exhausted their administrative remedies with respect to all claims, defenses, and issues in this matter which were not considered a part of the Rule S-1 review procedure and which are not a part of the Appeal to the United States Department of Education." (Pet. App. 59a).[2]

---

[2] FCC thus exhausted all avenues of administrative appeal pursuant to 511 IAC 7-15-4. According to 511 IAC 7-15-4(j), FCC's next step was an "appeal to a civil court with jurisdiction." (Res. App. 7). School City now asserts that exhaustion of administrative remedies is an issue for this Court.

First, School City did not raise the issue of exhaustion before the district court or the court of appeals, until its petition for rehearing. The issue was therefore waived. *See, e.g., Schoolcraft v. Sullivan*, 971 F.2d 81, 85 (8th Cir. 1992) ("The second element of jurisdiction, the exhaustion of administrative remedies, although jurisdictional, is nonetheless deemed waivable."), *cert. denied*, 114 S.Ct. 902 (1994).

Second, the question of exhaustion is entirely subordinate to the central question posed by the petition – whether 511 IAC 7-15-4 is an IDEA procedure or an EDGAR procedure. If 511 IAC 7-15-4 is an IDEA procedure, then FCC has exhausted its administrative remedies. If 511 IAC 7-15-4 is an EDGAR procedure, then an exhaustion issue would arise.

Third, even if the issue does arise, the type of exhaustion suggested by School City would be futile. School City asserts that FCC, having exhausted the procedures set forth in 511 IAC

B. Judicial Proceedings

On May 29, 1992, FCC filed suit against School City in the United States District Court for the Northern District of Indiana, South Bend Division. In its original complaint, FCC asserted four claims under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-85 (the "IDEA"), and three claims under Indiana law.

On December 4, 1992, School City filed with the district court a motion to dismiss, contending that FCC does not have standing to assert claims under the IDEA. School City also asked the district court to dismiss without prejudice FCC's state law claims by declining to exercise supplemental or pendent jurisdiction over them.

In response, on February 16, 1993, FCC moved for leave to amend its complaint and to dismiss without prejudice its state law claims. On February 24, 1993, the district court granted FCC's motion. FCC's state law claims were dismissed without prejudice, and FCC's Amended Complaint was filed.

7-15-4, must also exhaust the procedures available under 511 IAC 7-15-5. But School City has also argued that 511 IAC 7-15-5's procedures are not available to FCC because it is not a parent, guardian, or surrogate parent. Any attempt by FCC to resort to such remedies would obviously be futile. *See Honig v. Doe*, 484 U.S. 305, 326-27 (1988) ("It is true that judicial review is normally not available under § 1415(e)(2) until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate.").

On March 19, 1993, following oral argument, the district court issued a Memorandum and Order granting School City's motion to dismiss and ordering the entry of judgment accordingly (Pet. App. at 17-35a). FCC appealed to the United States Court of Appeals for the Seventh Circuit, which reversed the district court on January 5, 1994 (*Id.* 1a-16a).

The Seventh Circuit based its judgment, in relevant part, upon the following reasoning:

1. "Section 1415(b) of the IDEA requires states to provide an impartial administrative process that assures compliance with the federal mandate of a 'free appropriate education' by the relevant state agencies." Pet. App. 5a.

2. Indiana's IDEA-required administrative process is codified in part at 511 IAC 7-1-7 and, after amendment and recodification in January, 1992, at 511 IAC 7-15-4. *Id.*

3. "According to the IDEA, the required process 'shall include, but shall not be limited to' an opportunity for parents, guardians, or surrogates to examine records and file complaints with state or local educational authorities. 20 U.S.C. 1415(b)." *Id.*

4. "Congress created a procedural minimum below which a state cannot fall if it wishes to retain eligibility for federal assistance. In so doing, Congress gave no indication of forbidding a state from providing greater protection for the rights of the children." *Id.* at 13a.

5. "Indiana's regulatory scheme extends beyond the minimum required by § 1415 in that it permits '[a]ny individual, group of individuals, agency, or organization' to file a complaint alleging violation of federal or state laws that apply to special education. 511 IAC 7-15-4." *Id.* at 5a.

6. "In other words, the Indiana legislature has invited FCC to initiate the state administrative process required by § 1415(b). . . . " *Id.* at 14a.

7. FCC initiated and exhausted the Indiana procedure dictated by 511 IAC 7-1-7 and 511 IAC 7-15-4. *Id.* at 5-6a, 14a.

8. "Thus, FCC was entitled to proceed under paragraph (2) of § 1415(e). *Id.* at 14a.

On February 4, 1994, School City filed with the Seventh Circuit a Petition for Rehearing with Suggestion for Rehearing In Banc, in which School City took issue with step 2 of the court of appeals' reasoning – that 511 IAC 7-1-7 and its successor 7-15-4 were adopted by Indiana pursuant to the IDEA. School City argued that 511 IAC 7-15-4 is actually an EDGAR procedure, exhaustion of which does not entitle FCC to proceed in federal court under 20 U.S.C. § 1415(e). The court of appeals requested a response from FCC. In its response, FCC reviewed for the court the legislative history of 511 IAC 7-1-7 and 511 IAC 7-15-4, which reveal that these regulations were expressly adopted "to implement the provisions of the Individuals with Disabilities Education Act." 15 Indiana Register 505, 550 (Res. App. 3). The court of appeals

denied the Petition by Amended Order of March 17, 1994 (*Id.* at 60a).

ARGUMENT

This case turns on features of Indiana regulatory law which are unique and, if problematic for the State or its Department of Education, can be modified by amending regulations. The decision of the Seventh Circuit is a correct interpretation of present Indiana law and does not conflict with the holding of any other court. Thus, no further review of this case is warranted.

A. Indiana's 511 IAC 7-1-7 and 7-15-4 are Regulations Promulgated Pursuant to the IDEA, not EDGAR.

The Seventh Circuit was correct in its conclusion that the complaint procedure set forth in 511 IAC 7-1-7 and 511 IAC 7-15-4 was promulgated pursuant to the IDEA.

1. 511 IAC 7-1-7 was adopted before EDGAR was ever proposed.

Indiana's original special education complaint procedure, 511 IAC 7-1-7, was adopted by Indiana on September 24, 1978.[3] At that time, *there were no EDGAR*

[3] *See* 511 IAC 7-1-7 (1992 edition) ("filed Aug. 25, 1978") (Res. App. 2). In Indiana, regulations take effect 30 days after filing. *See* Indiana Code § 4-22-2-21; *see also* Indiana Register

regulations. The EDGAR regulations were not even proposed until May 1979 and were not adopted until May 1980. 44 Fed. Reg. 26308 (1979); 45 Federal Register 22494 (1980).[4] Certainly, 511 IAC 7-1-7, the predecessor to the subject regulation, 511 IAC 7-15-4, was not enacted pursuant to EDGAR.

2. 511 IAC 7-15-4 is the complaint mechanism called for under the IDEA.

Indiana's 511 IAC 7-1-7 was repealed effective January 8, 1992.[5] 15 Indiana Register 505, 558 (Res. App. 3, 7). At the same time, a new set of special education regulations – *including* 511 IAC 7-15-4 – was added with the express purpose *"to implement the provisions of the Individuals with Disabilities Education Act."* 15 Indiana Register 505 (Res. App. 3) (emphasis added). These regulations, as expressly stated by the Indiana Department of Education, were *not* implemented pursuant to EDGAR. *Id.*[6]

Vol.15 No. 4 (Jan. 1, 1992) at 505 (Res. App. 3) ("Effective 30 days after filing with the secretary of state.").

[4] *See also* 45 Fed. Reg. 77368 (1980), reporting the redesignation of 45 CFR 100b regulations to 34 CFR 76 regulations.

[5] At that time, on January 8, 1992, FCC's Request for Reconsideration was pending before the Division of Special Education.

[6] As Petitioner correctly notes (Petition p. 2) and is evident from the authority referenced by the regulations (Pet. App. 70-72a), the EDGAR regulations were not promulgated pursuant to the IDEA, but pursuant to various other provisions of Title 20.

Note also that 511 IAC 7-15-4 could not have been adopted pursuant to 34 CFR 300.660-62, because these federal regulations were not in existence at the time 511 IAC 7-15-4 was

As a group, these regulations comprise "Article 7" of Title 511 of the Indiana Administrative Code. Article 7 contains sixteen "Rules." Rule 15 (511 IAC 7-15), *which is entitled "Due Process Procedures"*, contains six "sections": 7-15-1 through 7-15-6. 15 Indiana Register 550-557 (Res. App. 3-7). One of these "due process procedures" is the complaint procedure, section 7-15-4, sandwiched between the mediation procedure and the hearing procedure. (*Id.*) Thus, when Indiana revised its special education regulations in 1992, it created a complaint procedure, 511 IAC 7-15-4, that is an IDEA "due process procedure."

The content, as well as the dress, of 511 IAC 7-15-4 compels this conclusion. Section 1415(b)(1)(E) of the IDEA calls for states to establish "an opportunity to present complaints." 511 IAC 7-15-4 provides an opportunity to present "complaints" – 511 IAC 7-15-5, by comparison, does not. Section 1415(b)(1)(E) of the IDEA calls for a mechanism to receive complaints about *special education*. 511 IAC 7-15-4 is limited to complaints about special education. Section 1415(b)(1)(E) of the IDEA does not limit its demand to a complaint procedure for parents and guardians only. Nor does 511 IAC 7-15-4.

In contrast, EDGAR calls for states to have in place a mechanism for receiving complaints about *all federally-funded education programs.*[7] 34 CFR 76.780 (Pet. App 70a).

---

adopted. 511 IAC 7-15-4 may now do double duty and fulfill Indiana's obligations under 34 CFR 300.660-62, as the State claims, but it certainly was not adopted for that purpose.

[7] EDGAR applies to over 20 federally-funded education programs, of which the IDEA is but one. *See* 45 Federal Register 22518-22519.

Far from the universal complaint mechanism envisioned by EDGAR, 511 IAC 7-15-4 is specific to special education, and it requires that complaints be submitted to one specific State department – the Division of Special Education. Title 511 IAC itself is entitled "Special Education," and the text of 511 IAC 7-15-4 makes no fewer than ten references to "special education" or the "division of special education".[8]

---

[8] 511 IAC 7-15-4 (Res. App. 3-7) provides:

> Sec. 4(a) Any individual, group of individuals, agency or organization may file a complaint alleging violations of federal or state laws that apply to *special education* programs. The complaint shall:
>
> * * *
>
> (4) be submitted to the *division of special education.*
>
> (b) The *division of special education* shall develop and implement written procedures to investigate complaints. These procedures shall be available upon request and shall include the following:
>
> (1) A system to follow when complaints are received by the *division of special education* office including the following:
>
> * * *
>
> (d) The investigation of a complaint may involve off-site and on-site investigation procedures. The complaint investigator shall have the following responsibilities:
>
> * * *
>
> (4) Filing a written response with the following:

Indiana's 511 IAC 7-15-4 may be contrasted with Arizona Administrative Code § R7-2-804 (Res. App. 8-10),

---

(A) The complainant.

(B) The superintendent or chief executive officer of the public agency involved.

(C) The *special education* program administrator of *the special education planning district* involved.

(D) *The director of the division of special education.*

* * *

(e) The final written response of the complaint investigator shall be filed within thirty (30) calendar days of the date the written complaint is received. An extension of time may be granted by the *director of the division of special education* only if exceptional circumstances exist with respect to a specific complaint. In that event, all parties shall be notified in writing of the extension and the reasons for it.

* * *

(h) Either the public agency or the complainant may request reconsideration by the *director of the division of special education* of any part of a complaint report. A request for reconsideration must be filed within fifteen (15) calendar days of the date the complaint report is received by the public agency and the complainant. The request for reconsideration shall:

* * *

(i) Reconsideration of a complaint report shall be conducted by the director of the division of special education. Written notice of the result of that reconsideration shall be issued within fifteen (15) calendar days of the date the request for reconsideration is received by the *director of the division of special education.*

the EDGAR procedure at issue in *Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992). The Arizona EDGAR regulation is not limited to special education complaints, but includes "complaints alleging the failure of a public agency or school district to comply with federal statutes or regulations applicable to federal education programs conducted under and subject to Title 34, Code of Federal Regulations, § 76.780." Ariz. Admin. Code § R7-2-804 (Res. App. 8).

Finally, while section 1415(e) of the IDEA contemplates a right of judicial review from the complaint procedure required by section 1415(b)(1)(E), EDGAR does not contemplate any judicial review.[9] Notably, 511 IAC 7-15-4(j) specifically states that a party disagreeing with the administrative result "may appeal to a civil court with jurisdiction." (Res. App. 7). Thus, judicial review is available under both 511 IAC 7-15-4 and 1415(e)(2) of the IDEA. Judicial review is available under section 1415(e)(2) where "findings and a decision [are] made under subsection (b)."[10] FCC received detailed written findings and a decision under 511 IAC 7-15-4, a "due process procedure" adopted "to implement the provisions of the Individuals with Disabilities Education Act." 15 Indiana Register 505, 550 (Res. App. 3).

---

[9] The fact that EDGAR does not require judicial review is a point made repeatedly by the Petitioner. (Petition n.9, n.10). This, of course, only supports the Seventh Circuit's conclusion that 511 IAC 7-15-4, which refers expressly to judicial review, is not an EDGAR regulation.

[10] Note that the IDEA does *not* require that a hearing take place prior to judicial review. 20 U.S.C. § 1415(e)(2) (Pet. App. 63a).

Indiana regulation 511 IAC 7-15-4 sets forth the complaint procedure described in the IDEA, not the complaint procedure described in EDGAR. The only reasonable conclusion is that drawn by both the District Court and the Seventh Circuit: 511 IAC 7-15-4 is indeed a due process procedure called for by section 1415(b) of the IDEA.

B. The Seventh Circuit's Decision Turned on Indiana Law and Does Not Conflict With Any Other Holding of Any Court.

The "decision to extend third-party standing to initiate due process hearing procedures under the IDEA by individuals and organizations other than parents, guardians, surrogate parents, or a public agency" (Petition p. 8) was made by the Indiana Department of Education when it promulgated 511 IAC 7-1-7 and 7-15-4. The Seventh Circuit did not make that decision, but merely acknowledged and applied it to the circumstances presented by this case.

The Indiana Department of Education, in effect, opened the door to FCC. If it wants to close that door, it can do so by amending its regulations. Indeed, counsel for the Department acknowledged to counsel for FCC that the Department intends to do so.[11] Such state

---

[11] This Court should note that the State of Indiana, which might otherwise be perceived as a neutral amicus curiae, in fact has an interest in supporting School City's petition. If FCC has standing, and the district court determines that School City has certain obligations to the FCC under the IDEA, then the State may share responsibility for fulfilling those obligations. For

regulatory action is the appropriate measure for shutting the door – not Supreme Court review.

No other court, let alone any other federal court of appeals, has addressed the rights of a party, in a position similar to that of FCC, to prosecute a complaint through the procedure set forth in Indiana's 511 IAC 7-15-4 and appeal from that procedure to federal district court.[12] The Seventh Circuit's decision, therefore, is not in conflict with any other decision.

Petitioner attempts to create a national issue with the allegation that "Every state has regulations substantially identical to those of Indiana." But, judging from the compilation of regulations gathered by the Petitioner,[13] it appears that not one of the other states' EDGAR regulations is identical to 511 IAC 7-15-4 in any relevant

---

similar reasons (but under Indiana state law rather than the IDEA), School City filed a third-party complaint against the State in the state-court litigation referred to by School City in footnote 5 of its petition. The very counsel who authored the amicus brief for the State are counsel of record in the state-court litigation.

[12] The cases cited to by petitioner as being "in conflict" with the Seventh Circuit's decision in this case (Petition pp. 12-13) all involve state regulations which are clearly EDGAR regulations. Citation to such authority begs the question which the Seventh Circuit faced and properly answered in this case.

[13] Curiously, Petitioner did not include the Arizona EDGAR provision discussed above, although FCC had included the complete text of that provision in its Answer to Petition for Rehearing, filed with the Seventh Circuit on February 22, 1994. As discussed above, certainly Arizona's EDGAR regulation is not "substantially identical" to Indiana's 511 IAC 7-15-4.

respect. Not one was promulgated with the express purpose "to implement the provisions of the Individuals with Disabilities Education Act." 15 Indiana Register 505, 550 (Res. App. 3). Not one is contained in a Rule which is entitled "Due Process Procedures." Not one is sandwiched between an IDEA due process mediation procedure and an IDEA hearing procedure. (Res. App. 3-7). Not one expressly contains a right to "appeal to a civil court with jurisdiction." In contrast, several of the other states' regulations (e.g. Arizona, Arkansas, Kentucky) clearly delineate their EDGAR procedures with references to EDGAR or to 34 CFR 300.

C. The Seventh Circuit's Decision Does Not Conflict With Congressional Intent.

As School City notes (Petition pp. 17-19), Congress itself considered including in the IDEA a requirement that every state's IDEA procedures allow complaints from individuals other than parents, guardians, or surrogate parents. Congress rejected that provision. Nevertheless, as the Seventh Circuit noted, Congress did not prohibit the states from enacting IDEA regulations to allow other third parties to enter the "IDEA due process" system.

> In § 1415, Congress created a flexible scheme to protect the educational rights and interests of children with disabilities. With respect to the boundaries of third-party standing under the IDEA, § 1415 establishes the required procedures in subsection (b) as the floor and Article III as the ceiling. Within that range, Congress has deferred to the judgment of the states and localities.

(Pet. App. 15a). School City does not directly challenge this proposition by its Petition. Nor could it, since there is no authority to the contrary.

D. The USDOE Memorandum Did Not Address The Seventh Circuit's Decision

Petitioner misrepresents the substance and purpose of the USDOE's March 22, 1994, memorandum (Pet. App. 88-96a). The USDOE explicitly stated the main purpose of that correspondence:

> The purpose of this memorandum is to call to your attention the requirements for State complaint procedures that are set out in §§ 300.660-300.662 of the final Part B regulations. We wanted to highlight these procedures, because they contain a number of **additional** requirements that State education agencies (SEAs) must implement – which were not required in past years, when the complaint procedures were included in the Education Department General Administrative Regulations (EDGAR).

(*Id.* at 88a; emphasis in original). The memorandum's primary focus is on the changes to the EDGAR requirements since they were removed from EDGAR and similar requirements were added to the IDEA regulations. These changes are set forth by the USDOE and highlighted in boldface type (*Id.* at 89-91a).

Nowhere does the USDOE memorandum mention the Seventh Circuit's decision in this case, either directly or indirectly. Nowhere does it mention the issue of

whether third parties can initiate IDEA due process procedures or whether and why a state would issue regulations to allow them to do so. Contrary to the misrepresentation of the Petitioner, there is no emphasis at all keeping out third parties from IDEA due process proceedings. Rather, the emphasis is on the availability of both the "complaint management" system and the "impartial due process hearing" mechanisms for parents: "Under Part B regulations, parents of children with disabilities have two separate means available to them for resolving disputes with public agencies concerning the education of their children. . . . " (*Id.* at 91a).

In short, the USDOE memorandum is not a response to the Seventh Circuit's decision in this case. The USDOE certainly makes no statement that could be interpreted to suggest the Seventh Circuit was wrong in its interpretation of Indiana's Rule 15 "due process" regulations. At most it could be interpreted as a message to the states to adopt proper EDGAR regulations in addition to their IDEA due process regulations.

The Seventh Circuit did not hold that every state has expanded access to the IDEA due process system to third parties such as FCC. The court merely ruled that Indiana did. If Indiana or its Department of Education now wishes its regulations to read differently, the Indiana Department of Education can amend its regulations without need for legislative or judicial approval.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES M. LEWIS
(Counsel of Record)
DOUGLAS D. SMALL
BARNES & THORNBURG
600 1st Source Bank Center
100 North Michigan
South Bend, Indiana 46601
Telephone: (219) 233-1171

Attorneys for Respondent

No. 94-116

In The

Supreme Court of the United States

October Term, 1994

SCHOOL CITY OF MISHAWAKA,

Petitioner,

v.

FAMILY & CHILDREN'S CENTER, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

APPENDIX TO BRIEF FOR THE RESPONDENT IN OPPOSITION

TABLE OF CONTENTS

Page

511 IAC 7-1-7 (1992) ..... App. 1

Indiana Register, Vol. 15, No. 4 (Jan. 1, 1992) pp. 508-58 (edited) ..... App. 3

Arizona Admin. Code § R7-2-804 (Supp. 1993) .. App. 8

9 *Indiana Administrative Code*, Titles 511 to 635 (1992 ed.):

511 IAC 7-1-7 Complaints; investigation
Authority: IC 20-1-1-6; IC 20-1-6-14
Affected: IC 20-1-6

Sec. 7. COMPLAINT PROCEDURES. Complaints concerning the implementation of, this Rule shall be investigated by the Division of Special Education of the Department of Public Instruction in accordance with the following procedures.

The Division of Special Education shall designate specific individuals who hold appropriate special education licensing, who are employed within the Division and who shall be responsible for investigating and acting on any allegations which may be made by public agencies, or private individuals, or organizations, of actions taken by any public agency that are contrary to the requirements of free appropriate public education as defined on page 3 of this Rule *[511 IAC 7-1-(J)]*.

The person conducting the investigation shall have the responsibility to provide for negotiations, technical assistance activities, and other remedial action to achieve compliance.

Within forty (40) school days of the initiation of a complaint, the person who is conducting the investigation shall file a final written response with the complainant, the superintendent of the school involved and the State Director of Special Education.

The response shall be binding on all parties and the parties have thirty (30) school days from the receipt of the response to achieve compliance.

Failure to achieve compliance shall result in withholding of State and Federal funds.

The response to the complaint may be appealed to the Commission on General Education by any of the parties. *(Indiana State Board of Education; Rule S-1, Sec VII; filed Aug 25, 1978, 4:40 pm: 1 IR 698) NOTE: Transferred from the commission on general education (510 IAC 7-1-7) to the Indiana state board of education (511 IAC 7-1-7) by P.L. 20-1984, SECTION 206, effective July 1, 1984.*

Indiana Register, Vol. 15, No. 4 (Jan. 1, 1992), pp. 505-58:

TITLE 511 INDIANA STATE BOARD OF EDUCATION

LSA Document #91-69(F)

DIGEST

Adds 511 IAC 7-3, 511 IAC 7-4, 511 IAC 7-5, 511 IAC 7-6, 511 IAC 7-7, 511 IAC 7-8, 511 IAC 7-9, 511 IAC 7-10, 511 IAC 7-11, 511 IAC 7-12, 511 IAC 7-13, 511 IAC 7-14, 511 IAC 7-15, and 511 IAC 7-16 to implement the provisions of the Individuals with Disabilities Education Act, also known as P.L.94-142. Repeals 511 IAC 7-1 and 511 IAC 7-2. Effective 30 days after filing with the secretary of state.

* * *

SECTION 13. 511 IAC 7-15 IS ADDED TO READ AS FOLLOWS:

Rule 15. Due Process Procedures

511 IAC 7-15-1 Suspension

* * *

511 IAC 7-15-2 Expulsion

* * *

511 IAC 7-15-3 Mediation

* * *

511 IAC 7-15-4 Complaints
Authority: IC 20-1-1-6; IC 20-1-6-14
Affected: IC 20-1-6

Sec. 4. (a) Any individual, group of individuals, agency, or organization may file a complaint alleging violations of federal or state laws that apply to special education programs. The complaint shall:

(1) be in writing;

(2) indicate the allegations of the technical violation and the circumstances on which the allegations are based;

(3) be signed by the complainant; and

(4) be submitted to the division of special education.

(b) The division of special education shall develop and implement written procedures to investigate complaints. These procedures shall be available upon request and shall include the following:

(1) A system to follow when complaints are received by the division of special education office including the following:

(A) Determination of the issues.

(B) Assignment of an individual to investigate and monitor compliance.

(2) The time lines for the investigation, issuance of a report, and monitoring compliance.

(c) The individuals assigned as complaint investigators shall be trained employees of the department of education, or other state agencies, as appropriate.

(d) The investigation of a complaint may involve off-site and on-site investigation procedures. The complaint investigator shall have the following responsibilities:

(1) Contacting the complainant and the public agency named in the complaint to clarify the issues, if necessary.

(2) Determining what investigation procedures will be necessary and notifying both parties regarding those procedures.

(3) Conducting the investigation.

(4) Filing a written response with the following:

(A) The complainant.

(B) The superintendent or chief executive officer of the public agency involved.

(C) The special education program administrator of the special education planning district involved.

(D) The director of the division of special education.

(E) The designated administrator of the state agency responsible for the administration and operation of the state agency programs, if appropriate.

(5) Facilitating, or providing for, negotiations between the parties, if necessary.

(6) Providing technical assistance to assist in achieving compliance.

(e) The final written response of the complaint investigator shall be filed within thirty (30) calendar days of the date the written complaint is received. An extension of time may be granted by the director of the division of special education only if exceptional circumstances exist with respect to a specific complaint. In that event, all

parties shall be notified in writing of the extension and the reasons for it.

(f) Orders issued by the complaint investigator shall be binding on the public agency unless appealed by the public agency. The time liens for the public agency to submit a corrective action plan and to achieve compliance shall be included in the complaint investigator's report. Compliance with orders issued by the complaint investigator shall be monitored by the division of special education.

(g) Failure of the public agency to achieve compliance with orders issued by a complaint investigator shall result in the withholding of federal and state funds to the public agency.

(h) Either the public agency or the complainant may request reconsideration by the director of the division of special education of any part of a complaint report. A request for reconsideration must be filed within fifteen (15) calendar days of the date the complaint report is received by the public agency and the complainant. The request for reconsideration shall:

(1) be sent to the director of the division of special education;

(2) be in writing, with a copy sent to the other party; and

(3) state the specific portions of the report the party believes should be reconsidered with specific reasons to support the request.

(i) Reconsideration of a complaint report shall be conducted by the director of the division of special education. Written notice of the result of that reconsideration shall be issued within fifteen (15) calendar days of the date the request for reconsideration is received by the director of the division of special education.

(j) Any party disagreeing with the result of the reconsideration by the director of the division of special education may appeal to the Secretary of the United States Department of Education. Either party disagreeing with the decision of the Secretary of the United States Department of Education may appeal to a civil court with jurisdiction. *(Indiana State Board of Education; 511 IAC 7-15-4; filed Dec 9, 1991, 8:30 a.m.)*

511 IAC 7-15-5 Due process hearings

* * *

511 IAC 7-15-6 Due process hearing appeals

* * *

SECTION 15. THE FOLLOWING ARE REPEALED: 511 IAC 7-1; 511 IAC 7-2.

LSA Document #91-69(F)
Proposed Rule Published: July 1, 1991; 14 IR 1883
Hearings Held: July 24, 1991 and July 25, 1991
Approved by Attorney General: Deemed approved by the Attorney General without signature under IC 4-22-2-32 on November 17, 1991
Approved by Governor: December 6, 1991
Filed with Secretary of State: December 9, 1991, 8:30 a.m.
Incorporated Documents Filed with Secretary of State: ANSI-1969.

Arizona Administrative Code, Title 7, Ch. 2 (Supp. 12/31/93):

R7-2-804. Compliance with federal statutes or regulations

A. This rule prescribes procedures to be used in filing and processing written complaints alleging the failure of a public agency or school district to comply with federal statutes or regulations applicable to federal education programs conducted and subject to Title 34, Code of Federal Regulations, § 76.780.

B. The Arizona Department of Education (Department) shall accept and investigate complaints provided that the complaint:

1. Is written and signed by the complaining party or his or her designated representative;

2. Sets forth the facts forming the basis of the complaint; the facts set forth in the complaint, if true, could constitute noncompliance by a public agency or school district;

C. Upon receipt of a complaint setting forth the criteria contained in (B), the Department shall immediately begin an impartial review which may include on-site investigations. If in the course of the review it is determined that the nature of the complaint is not a matter of noncompliance, the complainant will be so informed and advised of appropriate means of resolving the complaint.

D. A written decision with specific findings shall be issued by the Department within 60 calendar days of receipt of the written complaint. If corrective action is required, such action shall be designated in the

decision and shall include the time line for correction and possible consequences for continued noncompliance. A copy of the written decision shall be sent to the complaining party and the agency involved on or before the expiration of the 60-day period. An extension of this timeline will be permitted only if exceptional circumstances exist with respect to a particular complaint.

E. If there appears to be a failure or refusal to comply with the applicable law or regulations, and if the noncompliance or refusal to comply cannot be corrected or avoided by informal means, compliance shall be effected by the Superintendent and the State Board of Education by any means authorized by law or by rule and regulation. The Superintendent shall retain jurisdiction over the issue of noncompliance with the law or regulations and shall retain jurisdiction over the implementation of any corrective action required. However, nothing herein shall preclude the availability of an informal resolution between the complainant and the agency or school district involved, nor shall this rule preclude the availability of any administrative hearing remedies to resolve such disputes or judicial review of such administrative remedies.

F. If, pursuant to an investigation by the Department, the Superintendent finds a failure to comply with applicable law or regulations, he or she shall so inform the agency or school district and compliance shall be obtained by informal means whenever possible. If corrective action is required, such action shall be designated in this decision and shall include the time lines for correction and the possible consequences for continued noncompliance.

G. A summary of each complaint received and investigated by the Department and the decision of the

Superintendent shall be submitted annually to the State Board of Education for informational purposes only. Any personally identifiable information shall be deleted from the report to the State Board of Education.

H. The complainant may request the U.S. Department of Education to review the final decision of the Superintendent. The Department shall inform a complainant of the procedures for requesting a review by the U.S. Department of Education.